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PP

v.

KRISHNARAJ RAJENDRAN

B

HIGH COURT MALAYA, PULAU PINANG
ZAMANI A RAHIM J
[CRIMINAL CASE NO: 45-25-2011]
13 APRIL 2012

C

CRIMINAL LAW: *Murder - Penal Code, s. 302 - Prima facie case - Whether established - Failure to give description of accused in police report - Whether will lead to case being thrown out - Identification of accused - Whether there were peculiar characteristics or special distinguishing features triggering witness to identify accused - Failure to call officer who*

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conducted identification parade - Whether fatal to prosecution's case - Evidence of accused identity not satisfactory and unsafe to rely upon - Whether there was additional evidence to link accused with crime committed

E

CRIMINAL PROCEDURE: *Prosecution - Prima facie case - Whether established - Failure to give description of accused in police report - Whether will lead to case being thrown out - Identification of accused - Whether there were peculiar characteristics or special distinguishing features triggering witness to identify accused - Failure to call officer who*

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conducted identification parade - Whether fatal to prosecution's case - Evidence of accused identity not satisfactory and unsafe to rely upon - Whether there was additional evidence to link accused with crime committed

EVIDENCE: *Identification evidence - Witness identification of accused*

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- Whether there were peculiar characteristics or special distinguishing features triggering witness to identify accused - Failure to call officer who conducted identification parade - Whether fatal to prosecution's case - Evidence of accused identity not satisfactory and unsafe to rely upon

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The accused was charged with an offence of the murder of one Tan Kim Seng ('the deceased') under s. 302 of the Penal Code read together with s. 34 of the same. On 26 April 2008, the deceased and SP3 were fishing at a wooden jetty near Jambatan Tunku Abdul Rahman, Perai when three male Indians approached

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SP3 and the deceased. According to SP3, a tall and lanky male Indian who was holding a piece of stick (identified as the accused) had beaten SP3's back with the wood he was holding. A stout

male Indian took money from SP3 and kicked him, causing SP3 to fall into the river. The deceased was also hit with sticks by the three male Indians, including the accused, and was subsequently kicked and fell into the river. All the three male Indians then took the fishing gears belonging to SP3 and the deceased and left the place. SP3 managed to get out of the river and sought assistance. The deceased was subsequently found by the Police marine and moved to the mortuary at Penang General Hospital. An external and internal post-mortem on the deceased was conducted by SP5, who found that the injuries suffered by the deceased was sufficient in the ordinary course of nature to cause death. The cause of death certified by SP5 was 'severe head injury due to blunt trauma.' Counsel for the accused submitted that (i) SP3 did not give the description of the male Indian who assaulted him and the deceased in the police report; (ii) the identification of the accused was unreliable and doubtful as no identification report was advanced by the prosecution; (iii) the police officer who conducted the identification parade was not called to testify.

Held (acquitting and discharging the accused without calling for his defence):

(1) A police report, especially the first information report, is not an encyclopaedia. It is not meant to be exhaustive. It is only a complaint to set the affairs of law and order in motion. The report is not substantive evidence and omissions in it will not *ipso facto* lead to the case being thrown out (*Herchun Singh & Ors v. PP*, refd). Thus, counsel's submission on this issue was without merit. (para 8)

(2) The tall and lanky Indian was identified in court or dock identification by SP3 as the accused, some three years and nine months after the incident. There was no peculiar characteristic or evidence of special distinguishing features which triggered SP3 to remember and identify the accused, other than his height. SP3 too said in evidence that he identified the accused at an identification parade as 'orang memukul saya pada pagi tersebut'. SP3 did not also say that he identified the accused as an assailant who assaulted the deceased which led to his death. (para 39)

(3) No reason was rendered as to why the officer who conducted the identification parade, ASP Azman Ali was not called to testify, save that he was merely offered to the defence at the close of the prosecution's case. ASP Azman Ali was a material witness, and his evidence was crucial to explain whether the identification parade was held in compliance with the Inspector General Standing Order Part D 226 ('IGSO'). It was essential that precautionary measures were taken to ensure the parade was just and fair to the accused. It was incumbent upon the prosecution to call the officer who conducted the parade, to refute or explain matters raised herein to dispel lurking doubt in the mind of the court. (paras 40 & 43)

(4) Other than an unsatisfactory evidence of dock identification of the accused herein, no other additional evidence was adduced to link the accused with the crime. The standard of prosecution in this case, especially the failure to call the officer who conducted the identification parade was proved to be fatal to the prosecution. The prosecution failed to establish a *prima facie* case of murder under s. 302 of the Penal Code against the accused as charged. The evidence of the accused identity was not satisfactory and unsafe to rely upon. Further, the decision of the Federal Court case of *Magendran Mohan v. PP* was binding on this court based on the doctrine of *stare decisis*. (paras 44-46)

Case(s) referred to:

Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC ***(dist)***
Arumugam Muthusamy v. PP [1998] 3 CLJ 597 FC ***(dist)***
Chock Kek Ling v. Patt Hup Transport Co Ltd & Ors [1965] 1 LNS 25 HC ***(refd)***
Herchun Singh & Ors v. PP [1969] 1 LNS 52 FC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Magendran Mohan v. PP [2011] 1 CLJ 805 FC ***(foll)***
Ong Poh Cheng v. PP [1998] 4 CLJ 1 CA ***(dist)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
PP v. Jaafar Ali [1999] 1 CLJ 410 HC ***(refd)***
PP v. Ng Lai Huat & Ors [1990] 1 CLJ 1190; [1990] 2 CLJ (Rep) 774 HC ***(refd)***
R v. Turnbull & Ors [1976] 3 All ER 549 ***(refd)***

Legislation referred to:

Firearms (Increased Penalties) Act 1971, ss. 3, 4
Penal Code, ss. 34, 302, 308

For the prosecution - Tan Guat Cheng (Emma Syafawati Abdul Wahab with her) DPP
For the accused - RSN Rayer; M/s R Nethaji Rayer & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Zamani A Rahim J:

[1] The accused was charged with an offence of murder of one Tan Kim Seng under s. 302 of the Penal Code read together with s. 34 of the same Code. The charge reads as follows:

The Charge

> Bahawa kamu bersama-sama 2 lagi yang masih bebas pada 27 April 2008 di antara jam 2.30 pagi hingga 3.30 pagi bertempat di kawasan Jambatan Tunku Abdul Rahman, Perai, Bukit Mertajam, di dalam Daerah Seberang Perai Tengah, di dalam Negeri Pulau Pinang, dengan niat bersama telah melakukan kesalahan bunuh dengan menyebabkan kematian seorang bernama Tan Kim Seng KPT: 68-212-01-5039, dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan, dibaca bersama Seksyen 34 Kanun yang sama.

Brief Facts Of Case

[2] On 26 April 2008 at about 11.30pm, a complainant, Ho Han Kim, SP3 and Tan Kim Seng, (deceased) went fishing at a wooden jetty near Jambatan Tunku Abdul Rahman, Perai.

[3] At about 2am (27 April 2008), SP3 saw a Chinese lady on the Jambatan Tunku Abdul Rahman talking over a handphone. She was heard quarrelling with her husband. Not long thereafter, a motorcycle ridden by a male Indian came. The male Indian was stout. He approached the said Chinese lady and invited her to go back. On hearing this, SP3 advised the said Chinese lady not to get close to the stout Indian man. The stout Indian man was annoyed and reprimanded SP3. He left the place on his motorcycle. Subsequently, a male Chinese also came on motorcycle. The said Chinese lady left the place on the motorcycle with the said male Chinese.

[4] SP3 and the deceased then packed their fishing gear to go home, when two motorcycles came with three male Indians, including a stout male Indian who approached the Chinese lady earlier. The male Indians came from the direction of Chai Leng Park. The stout male Indian who was holding something, approached SP3 and the deceased. SP3 was at 'X" and the deceased was at "Y" in photograph, P6C. Another male Indian was tall and lanky, was holding a piece of stick measuring who approximately four feet in length and four inches in diameter (identified as the accused). The accused beat SP3's back with the wood he was holding. The stout male Indian took the money from SP3's pocket and kicked him. SP3 fell into the river. He was able to keep afloat by grabbing unto a rope from a boat underneath the jetty (see photograph, P3B).

[5] The deceased was also hit with sticks by the three male Indians, including the accused and the stout male Indian. The deceased was hit on his head and hands. All the three assailants demanded the deceased to jump into the river, but the deceased was reluctant as he could not swim. The deceased was kicked and he fell into the river. Once fallen into the water, SP3 did not see what happened to the deceased.

[6] All the three male Indians, including the accused took SP3's and the deceased's fishing gears and left the place. They were heading towards Chai Leng Park. Later, SP3 managed to get out of the river and walked to the main road to seek assistance. An operation was then mounted to trace the deceased.

[7] Subsequently, the deceased was found by the Police Marine, not far from the jetty where he was fishing. The deceased's body was removed to the mortuary at Penang General Hospital. An external and internal postmortem on the deceased was conducted by a Consultant Pathologist, Dr Bhupinder Singh, SP5. An internal examination, SP5 found a blood clot under the skin of the head. The injuries suffered by the deceased was sufficient in the ordinary course of nature to cause death. SP5 opined that a blunt object could have caused the injuries found on the deceased. The cause of death certified by SP5 was "severe head injury due to blunt trauma".

The Contents Of the Police Report

[8] Learned counsel submitted that SP3 did not give the description of the male Indian who assaulted him and the deceased in the police report, P7. SP3 too did not state (i) the manner and which part of the deceased body was assaulted by the male Indian as the assault was fast and it happened in darkness. The police report, especially the first information report is not an encyclopedia. It is not meant to be exhaustive. In the Federal Court case of *Herchun Singh & Ors v. PP* [1969] 1 LNS 52, it had discussed on matters which were omitted in the first information report as follows.

> As regards omission in the first information report, we would endorse Sohoni's commentary on s. 154 of the *Indian Criminal Procedure Code* (16th edn., Vol. 1, p. 750), which is similar to s. 107 of our Criminal Procedure Code, as follows:
>
> > It is a mistake to believe that a person cannot be the accused unless his name appears in the first information report. The provisions of the Code lay down no such stipulation. All that is required for purpose of this section is that there should be clear, definite information about the commission of a cognizable offence to set the investigation machinery in motion. Further, the information required need not contain the circumstances of the commission of the offence, nor the names of the offenders or the witnesses, for the main purpose of investigation is to ascertain these matters ... The first information report is not an Encyclopedia. It is not the beginning and ending of every case. It is only a complaint to set the affairs of law and order in motion. It is only at the investigation stage that all the details can be gathered and filled up. But it cannot be said that omission in the first information report would always be of no significance. The report is not substantive evidence and omissions in it will not *ipso facto* lead to the case being thrown out. But it is a piece of corroborative evidence; omissions in it will, other things being the same, deprive the prosecution of the most valuable corroboration and thereby make the story suspicious.

[9] In *Chock Kek Ling v. Patt Hup Transport Co Ltd & Ors* [1965] 1 LNS 25, the fourth defendant had failed to mention a certain fact in the report. Raja Azlan Shah J (as His Royal Highness then was) said:

> To this I would say that the report does not and will not contain everything under the sun.

[10] Learned counsel submission on this issue is without merit.

Identification Of The Accused

[11] Relying on the case of *PP v. Jaafar Ali* [1999] 1 CLJ 410, learned counsel argued that the identification of the accused was unreliable and doubtful as no identification report was advanced by the prosecution. Not only that, the police officer who conducted the identification parade was not called to testify. In his evidence in court, SP3 had identified the accused. SP3 too made an identification of the accused at the identity parade and his evidence ran as follows:

> Pada 2.5.2008, jam 11.00 pagi, saya telah menghadiri satu kawad cam yang diadakan di Balai Polis Bandar Perda. Saya dapat mengecam OKT sebagai orang yang memukul saya pada pagi tersebut.

[12] Learned counsel had strenuously challenged SP3's evidence in cross examination on the issue of his identification of the accused in the identity parade. The cross examination ran as follows:

> Saya ada hadir kawad cam di Bandar Perda. Saya berjumpa dengan Inspektor.
>
> Kawad cam diadakan dibilik lain. Inspektor itu bawa saya pergi ke sana. Saya setuju saya pergi ke bilik itu di tingkat atas menggunakan tangga.
>
> Sebelum saya masuk ke dalam bilik di tingkat atas, saya tidak bertemu dengan OKT dan juga ibunya.
>
> Sebelum saya masuk ke bilik kawad cam, saya hanya nampak ibu OKT sahaja. Saya tidak nampak OKT. Saya lihat ibu OKT dekat dengan bilik kawad cam.
>
> Saya boleh cam ibu OKT (saksi telah cam ibu OKT).
>
> Mahkamah:
>
> Ibu OKT bernama Krishaveni a/p Govindasamy.
>
> Saya tahu beliau ibu OKT sebab Inspektor beritahu kepada saya.
>
> Katakan - semasa awak masuk bilik kawad cam, OKT ada bersama-sama ibunya di luar bilik kawad cam.
>
> Jawab - tidak benar.

Inspektor tersebut berada di dalam bilik kawad cam. Dia berdiri di tepi.

Kawad cam diadakan sebanyak 2 kali. Kali pertama Inspektor tersebut berdiri di tepi. Kali kedua Inspektor itu meninggalkan bilik kawad cam kerana dia kata, dia ada kerja.

Selepas kawad cam kali kedua, saya keluar bercakap dengan Inspektor dan selepas itu saya balik. Semasa saya balik saya tidak berjumpa dengan OKT dan ibu OKT.

Katakan - semasa kawad cam Inspektor telah menunjukkan OKT kepada kamu.

Jawab - tidak benar.

Saya masuk ke dalam bilik kawad cam dan keluar dari bilik kawad cam melalui pintu yang sama. Saya lalu di hadapan OKT.

Saya hanya nampak ibu OKT. Saya tidak nampak OKT.

Saya tidak nampak ibu OKT semasa saya keluar bilik kawad cam.

Katakan - setelah keluar dari bilik kawad cam awak sekali lagi melalui di hadapan ibu OKT.

Jawab - saya tidak setuju.

Saya nampak ibu OKT setelah saya keluar dari Balai melalui pintu besar hadapan.

Katakan - semasa keluar dari pintu besar hadapan Balai, awak bercakap dengan Inspektor memberitahu awak telah mengecam OKT sebagai lelaki yang berada bersama-sama orang yang memukul kawan kamu.

Jawab - saya tidak setuju.

Katakan - awak beritahu Inspektor bukan OKT yang pukul kawan kamu.

Jawab - OKT juga mengambil bahagian memukul.

Katakan - awak buat tuduhan ke atas OKT sebab si mati adalah kawan karib kamu.

Jawab - saya tidak setuju.

Katakan - lelaki India yang sebenar memukul kawan kamu ialah Steven dan Suresh yang menyebabkan kematiannya.

A Jawab - saya tidak kenal mereka.

Katakan - awak tidak kenal OKT sebab itu awak tuduh dia.

Jawab - OKT berada di tempat kejadian.

B **[13]** As regard identification parade, the investigating officer, SP8 said in the following words:

> Pada 2.5.2008, jam 10.00 pagi saya telah arahkan ASP Azman untuk menjalankan kawad cam ke atas OKT. Saksi yang mengecam ialah seorang lelaki Cina bernama Ho Han Kim, SP3.
>
C
>
> Setelah kawad cam selesai, ASP Azman telah melaporkan kepada saya bahawa kawad cam adalah positif, iaitu saksi telah mengecam OKT sebagai memukul saksi (Ho Han Kim) dan rakannya, si mati.

D **[14]** Needless to say, SP8's evidence that he was informed by ASP Azman (not in court) that SP3 had identified the accused in the identity parade as the person who assaulted him and the deceased. If SP3's evidence is introduced for the purpose of proving SP3 had identified the accused is certainly hearsay and
E therefore inadmissible. In other words, if the object of the evidence is to establish the truth of what is contained in the statement. In *PP v. Ng Lai Huat & Ors* [1990] 1 CLJ 1190; [1990] 2 CLJ (Rep) 774, Faiza Tamby Chik JC (as he then was) said in this way relating to hearsay evidence at p. 777:

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> The general rule is that hearsay evidence is not admissible as proof of a fact which has been stated by a third person. This rule has long been established as a fundamental principle of the law of evidence.
>
G What is hearsay evidence? Evidence by a witness of what another person has stated (whether verbally, in writing or otherwise) on a prior occasion is inadmissible for the purpose of proving that any fact stated by that person on such prior occasion is true. The hearsay rule will be infringed where reliance is placed on the
H evidence of someone not before the court where the evidence is adduced in order to prove that the facts as stated are true.

And in *Teper v. R* [1952] 2 All ER 447, Lord Normand said:

> The rule against the admission of hearsay evidence is fundamental.
I It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost.

[15] His Lordship went on to say as follows: A

> The hearsay rule does not apply where the purpose of adducing the evidence is to show not the truth of what was said but that the statement was in fact made. The relevance of such evidence, called original evidence, is revealed by the leading case of *Subramaniam v. PP*. B

[16] His Lordship also cited the English case of *Ratten v. R* [1972] AC 378, where Lord Wilberforce at p. 387 said, *inter alia*:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. C D

[17] To salvage its case from sinking, the prosecution had advanced three decisions of the Federal Courts namely, *Ong Poh Cheng v. PP* [1998] 4 CLJ 1, *Arumugam Muthusamy v. PP* [1998] 3 CLJ 597 and *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800. Now let us scrutinise these authorities in turn. E

[18] In *Ong Poh Cheng*'s case *supra*, the main issue in the appeal was the identity of the appellant as the robber. The learned deputy public prosecutor submitted that the dock identification of the appellant was not the only evidence that connected the appellant to the crime. The facts are these. The appellant was originally charged for an offence under s. 3 of the Firearms (Increased Penalties) Act, 1971 (the Act) in that he discharged a firearm with intent to cause death or hurt in the course of a robbery, an offence punishable with death upon conviction. At the close of the prosecution case, the charge was amended under s. 4 of the Act in that he exhibited a firearm in a manner likely to put a person in fear of death or hurt in the course of a robbery. The trial judge also added an additional charge that the appellant had discharged the firearm to Constable Mohd. Tahir and Constable Mohd Yusoff with the intention of causing death or such bodily injury likely to cause death to the said policemen, an offence punishable under s. 308 of the Penal Code. F G H

[19] At the close of the defence case, the appellant was found guilty on both the charges. The learned trial judge made a finding of fact that apart from indelible identification in court, there were I

other evidence that pointed irresistibly to the appellant as the robber. The police constable, SP9 testified that when he opened fire at a fleeing robber "Saya rasa dia kena tembak". The appellant who was arrested one month later had two healed gunshot wounds, one in the elbow region of the left arm and the other on right buttocks, with entry point in each case from the rear. Further, when the appellant was arrested, a gold bracelet recovered from him was positively identified as one of the articles stolen from Tai Loong Diamond and Jewellery shop of 90 Pitt Street, Penang. Several other gold items recovered were also positively identified by the proprietor of the said shop, SP1.

[20] The learned trial judge had rejected the identification of the appellant at the identification parade, but His Lordship had accepted the dock identification of the appellant as the robber as there were overwhelming evidence against him.

[21] His Lordship Shaik Daud JCA said as follows:

> Generally speaking, an identification at an identification parade, held usually a short time after the incident, would tend to strengthen the prosecution's case but it does not follow that the lack of it would be fatal, or would destroy a court or dock identification. It must necessarily depend on the facts and circumstances of each particular case. Unlike in the case of *Arumugam Muthusamy v. PP* [1998] 3 CLJ 597 where the court relied solely on the dock identification, the present case there are other cogent evidence to put the appellant at the scene of the robbery. The court's identification merely to confirm this. On the facts and circumstances of this case, the court or dock identification of the appellant was rightly accepted.

[22] In conclusion, in view of the overwhelming evidence before the court, the appellant's appeal was dismissed and his convictions and sentences were confirmed.

[23] In *Arumugam Muthusamy*'s case *supra*, two questions were raised in this reference, namely:

(1) Whether dock identification in court after a long lapse of time without holding an identification parade can be sufficient basis for a conviction; and

(2) Whether in a case defendant solely on dock identification the failure to direct himself with regard to the visual evidence of identification in accordance with the established guidelines in

R v. Turnbull & Ors [1976] 3 All ER 549, resulting in a conviction based on uncorroborated evidence of identity being quashed would constitute a substantial miscarriage of justice.

Question (1) above.

The Federal Court answered *inter alia*:

"Generally speaking, however, a dock identification in the sense as described above, ie, identification of an accused for the first time in court at the trial is undesirable, and it would be a good practice to hold an identification parade, which, if it turns out to be positive, would tend to strengthen the case for the prosecution. But to hold that an identification parade must, in all circumstances, be conducted in order to sustain a identification parade cannot or need not be held, for example, where the attendance of the witness at the parade is physically impossible or impracticable or there are exceptional circumstances."

Question (2) above.

"The central issue was one of identification ie, whether the applicant was at the complainant's house on the night of 1 April 1986 or early morning 2 April 1986. In this case, there were two identification witnesses, PW1 and PW2. The quality of the identification evidence was good. Apart from identification evidence, there were other evidence, that is, the car keys in the applicant's possession at the time of his arrest, both PW4 and PW5, who effected the arrest, said they used to see the applicant driving the car, and the car was parked in front of the shop where the applicant lived. Both PW4 and PW5 were not challenged on this.

[24] On the other hand, the defence of the applicant was one of a complete denial.

[25] Chong Siew Fai CJ (Sabah and Sarawak) held at p. 604:

In the instant case before us, it would have been prudent to hold an identification parade. However, having regard to the cumulative effect of the evidence of both the prosecution and the defence as a whole, more particularly, the evidence of PW1 and PW2 which both courts below accepted, the supporting evidence respecting, *inter alia*, the recovery of the car keys from the applicant, the use of the car by the applicant, the removal of the car from the front

A of the shop where the applicant lived, as well as the stance of the applicant in his defence, which was an absolute denial, we see no failure of justice having occasioned nor do we see any ground for contending that the conviction is unsatisfactory or unsafe. This is not a case in which the witness's ability to make identification
B is in doubt. We see no reason to interfere with the trial magistrate's finding which was affirmed by the High Court. We are of the unanimous view that on the particular facts and circumstances of this case, there had been no miscarriage of justice and that the concurrent findings of the trial magistrate and the High Court ought not to be disturbed. We accordingly order
C the conviction and the 14 months imprisonment sentence do stand.

[26] In *Ahmad Najib Aris*'s case, supra the appellant was charged with the rape and murder of a Chinese lady, Ong Lay Kian (the deceased). A Proton Tiara WFN 6871, P145 was found behind a
D shop at Jalan Petaling Utama 1. Four days later, a burnt body was found in a manhole at Batu 7, Jalan Klang Lama. Upon DNA tests the body was confirmed to be that of the deceased. An autopsy was conducted on the deceased by PW30 and the cause of death was strangulation by a cloth around the deceased neck.
E The deceased's hands were also tied with the cloth. The appellant's room was searched, a pair of Jack Blue Classic jeans, P68A with a Calvin Klein belt, P68B and blue cap were found. The jeans had blood stains and DNA tests confirmed that it is the deceased's blood. PW30 who conducted the autopsy also took a
F vaginal swab from the deceased and DNA tests by PW27 showed that it is the appellant's semen.

[27] The blood stains on the back seat, P57A and the driver's seat, P55A of the Tiara car, P145 were confirmed to belong to the deceased. Six strands of hair, P56C found in the car were
G also confirmed to be the deceased's hair.

[28] The cloth tying the deceased's hand, P62A, was found to have the same colour, texture and composition with the muslin cloth, P82A from the appellant's workplace at MAS which is used
H to clean airplanes. A MAS storekeeper, PW26 said in his evidence that he normally saw the appellant coming to work carrying a sling bag with a Maybank logo similar to P23.

[29] The learned High Court judge accepted the evidence of the
I prosecution witnesses, namely, PW4, PW5 and PW12 as to the identification of the appellant at the various scenes or locations where the appellant was found to have been with the deceased.

PW4 and PW5 had identified the appellant in court and during identification parade. The learned trial judge also accepted the evidence of the chemist, PW 27 and the evidence of the DNA analysis and the result, P 83 with regard to the relevant exhibits produced by the prosecution. Based on the circumstantial evidence tendered by the prosecution, the learned trial judge came to the conclusion that a *prima facie* case had been made out and called the appellant for his defence. The appellant opted to remain silent; the learned trial judge had no alternative but to convict the appellant on both charges instituted against him and passed the sentence accordingly.

[30] The Court of Appeal too accepted the evidence on the identification of the appellant by PW4 and PW5. The Court of Appeal also accepted the evidence of the chemist, PW27 and the DNA, P83 evidence. Relying on circumstantial evidence, the Court of Appeal found that it was the appellant and no one else who was responsible for what happened to the victim that night. The Court of Appeal therefore dismissed the appeal and affirmed the convictions and sentences on the appellant.

[31] At the Federal court, the appellant raised the issue of identification parade in that the police did not comply with the established procedure. Zulkefli Makinuddin FCJ (as he then was) said as follows:

> ... it is my view that it is not an all cases that the prosecution is required to conduct an identification parade. I am of the view that it is only where the primary issue is the identity of the accused or whenever the case against an accused person depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken that the principles or the guidelines as laid down in the case of *Regina v. Turnbull & Anor* [1977] 1 QB 224 need be followed and the identification parade conducted. In the present case it is to be noted that the identification of the appellant by PW4, PW5 and PW12 was not based on a fleeting glimpse as in *Turnbull*'s case. Unlike the facts in *Turnbull*'s case there are also other forensic and supporting evidence connecting the appellant with the crime in the present case. It is my considered view that the quality of the identification evidence of PW4, PW5 and PW12 in the present case is good and remains good throughout the prosecution's case and that the question of a mistaken identity cannot arise. Therefore even discounting the identification parade, the prosecution witnesses PW4, PW5 and PW12 had indeed positively identified the appellant.

[32] The Federal Court too dismissed the appellant's appeal and affirmed the concurrent findings of the learned trial judge of the High Court and the Court of Appeal.

[33] What are common features in the cases of *Ong Poh Cheng*, *supra*, *Arumugam Muthusamy*, *supra* and *Ahmad Najib Aris*, *supra* are that, apart from the evidence of dock identification, there are other additional circumstantial and forensic evidence implicating the appellant to the crime.

[34] Now, I propose to examine a recent Federal Court case of *Magendran Mohan v. PP* [2011] 1 CLJ 805 where the prosecution's case is entirely on circumstantial evidence. One of the circumstantial evidence was as regard the jewellery. PW8 was the only witness who said in evidence that on the night of 12 August 2000 the deceased was wearing jewellery. She identified the jewellery, P5 to P8 in court. However, there was no evidence by PW5 and PW11, who were also present there, that the deceased was wearing jewellery on 13 August 2000, when she left the house in the afternoon together with the appellant. It is strange that only PW8 noticed the deceased wearing the jewellery.

[35] The next circumstantial evidence relied on by the prosecution, ie, the evidence of PW4, a pawnshop assistant. In his evidence, PW4 said that on 14 August 2000 someone came to his pawnshop to pawn some stolen jewellery. He could not remember what was pawned. He did not know the appellant before this. He identified the appellant in the dock as he was ordered by the police to do so. He admitted that he was not sure of the male Indian who came to pawn the jewellery on 14 August 2000. He also agreed, in cross examination, that he was not asked by the police to identify the jewellery that was recovered. He agreed that he was not sure of the jewellery that was pawned.

[36] There is no eye witness to narrate or to give the version of how the incident happened. As regard the evidence of identification of the appellant, Alauddin Mohd Sheriff, PCA (as he then was) at p. 821 said in the following words:

> From the evidence of PW4 (a pawnshop assistant), we also observed that there was no identification parade conducted by the police for PW4 to identify the appellant. His identification of the appellant in the dock some three years and four months later is in our opinion most unsatisfactory, especially so when PW4 had stated that he did not know the appellant before this (see *Arumugam Muthusamy v. PP* [1998] 3 CLJ 597 and *PP v. Syed Muhamad Faysal Syed Ibrahim* [2004] 1 LNS 159).

[37] His Lordship went on to make the finding at p. 822 as follows: A

> In view of the above omission by the prosecution and since the "male Indian" was not known to PW4, this court is unable to accept the identification of the appellant in court to confirm that the appellant was the "male Indian" who had pawned the jewellery on August 14, 2000. B

[38] Accordingly, the appellant's appeal was allowed. The conviction and sentence of the appellant was set aside. The appellant was acquitted and discharged. C

[39] In this case, it is clear that the tall and lanky Indian was not known to SP3. He was identified in court or dock identification by SP3 as the accused, some three years and nine months after the incident. There was no peculiar characteristics or evidence of special distinguishing features which triggered SP3 to remember and identified the accused, other than his height, this is a tall and lanky Indian. SP3 too said in evidence that he identified the accused at an identification parade as "orang memukul saya pada pagi tersebut". SP3 did not also say that he identified the accused as an assailant who assaulted the deceased which led to his death. D E

[40] Holding an identification parade of a suspect who is unknown to the identifier is a good practice and desirable, but not necessary in all cases. It is all depending on the facts and circumstances of each individual case. A positive identification at the parade would tend to corroborate the identifier's evidence and thus strengthen the case for the prosecution. This case is unlike the case of *Magendran Mohan*, *supra* where no identification parade was ever held. Based on the facts of this case, the decision of the prosecution to hold the identification parade on 2 May 2008, that is, about six days after the incident was a wise and correct decision. SP3 was called and according to him he had identified the accused as the person who assaulted him in the morning in question. But no reason was rendered as to why the officer who conducted the identification parade, ASP Azman Ali was not called to testify, save that he was merely offered to the defence at the close of the prosecution's case. The officer who conducted the identification parade, ASP Azman Ali is definitely a very material witness having regard to the evidence of SP3, SP8 and the F G H I

circumstances of this case. Offering of the material witness, though accepted by the defence as in this case, will not prevent an adverse inference being drawn. In the case of *PP v. Chia Leong Foo* [2000] 4 CLJ 649, Augustine Paul J (as he then was) said:

> Where the evidence of a witness is material he must be called to testify. Offering him to the defence, in such circumstances, will not prevent an adverse inference being drawn.

[41] In the context of this case and having regard to vigorous challenges on the identification evidence in cross-examination by learned counsel, the evidence of the officer who conducted the parade is crucial to explain whether the identification parade is held in compliance with the "IGSO" Part D 226 presumably made pursuant to the Police Act, 1967. IGSO is an abbreviation for Inspector General Standing Order. It is essential that precautionary measures are taken to ensure the parade is just and fair to the accused.

[42] In his evidence, SP 3 said that the identification parade was conducted by an Inspector, whilst the investigating officer, SP 8 said it was an Assistant Superintendent of Police (ASP for short) by the name of ASP Azman Ali. An Inspector and ASP are two different levels of rank in the police force and therefore, it cannot be assumed that the officer is one and the same person. Further, according to SP3 the identity parade was conducted twice. The first time, the Inspector was standing at the side. The second time, the Inspector left the room of the identification parade as he had other work to attend to. Why is the parade conducted twice as there is only one suspect involved, namely, the accused. Further, it can be gathered from cross-examination that attempts were repeatedly made by learned counsel that SP 3 had seen the accused at the police station before the parade was held.

[43] In the light of the above, I am of the considered view that it is incumbent upon the prosecution to call the officer who conducted the parade, be it the Inspector or ASP, to refute or explained the matters adumbrated above to dispel lurking doubt in the mind of the court.

[44] Learned counsel also took exception as items which were allegedly stolen from SP3 or the deceased were never recovered from the accused. I recognise that not in all criminal cases are stolen items recovered and tendered in court. As I understand learned counsel's submission, other than an unsatisfactory evidence

of dock identification of the accused in this case, no other additional evidence, unlike the cases of *Ong Poh Cheng*, *supra*, *Arumugam Muthusamy*, *supra* and *Najib Aris*, *supra*, to link the accused with the crime. With due respect to learned deputy, the standard of prosecution in this case, especially the failure to call the officer who conducted the identification parade is proved to be fatal to the prosecution.

Consideration At The Close Of The Prosecution's Case

[45] Having considered all the evidence tendered by the prosecution at the close of its case on a maximum basis as propounded in the Court of Appeal case of *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734, and a written submission advanced by both the defence and the prosecution, I am not satisfied that the prosecution has established a *prima facie* case of murder under s. 302 of the Penal Code against the accused as charged. The evidence of the accused identity is not satisfactory and unsafe to rely upon.

[46] I have no alternative but to follow like an obedient son the recent decision of the Federal Court case of *Magendran Mohan*, *supra* is binding on this court based on the doctrine of *stare decisis*.

[47] Accordingly, the accused is acquitted and discharged without calling for his defence.